



## Request for legal advice concerning parking tickets

### Ombudsman's opinion

<b>Legislation:</b>	Local Government Official Information and Meetings Act 1987, s 7(2)(g) (see Appendix for full text)
<b>Requester:</b>	Janine Rankin / Manawatu Standard
<b>Agency:</b>	Palmerston North City Council
<b>Ombudsman:</b>	Dame Beverley Wakem DNZM, CBE
<b>Reference number(s):</b>	345717
<b>Date:</b>	April 2014

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## Summary

Janine Rankin of the Manawatu Standard requested a copy of the Palmerston North City Council's legal advice concerning parking tickets. After investigating I formed the opinion that it was necessary to withhold the legal advice under section 7(2)(g) of the Local Government Official Information and Meetings Act (LGOIMA) in order to *"maintain legal professional privilege"*. However, I considered that this interest was outweighed by the public interest in disclosure to the extent that Council should release a summary of the advice, along with a public statement setting out certain matters. Given that the Council has agreed to release an appropriate summary and public statement it is not necessary for me to make any recommendations in this case.

## My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which an agency subject to LGOIMA refuses to make official information available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

## Background

### The request

2. In relation to vehicle parking meters within the Council area, Janine Rankin, a Manawatu Standard reporter, in her letter of 27 August 2012 to the Council requested:

*"a copy of the legal opinion the Council received about the ability to infringe people for paying for the wrong bay number and thus failing to activate their machine correctly."*

3. In a letter of 14 September 2012 to Ms Rankin, the Council advised that it was withholding the information sought under section 7(2)(g) of LGOIMA. The Council stated:

*"Council has received several legal opinions relating to the [subject of the request]. Copies of these opinions, however, will not be made available to you. The reason for withholding these documents is to maintain legal professional privilege. This reason for withholding official information is permitted by section 7(2)(g) of the Local Government Official Information and Meetings Act 1987."*

## The complaint

4. On 22 November 2012 Ms Rankin complained to me about the Council's decision. She stated:

*"Readers have questioned whether it is an offence that fits within the definition of the city's bylaws.*

*And recently, the council has deflected criticism by saying the \$40 is set by central government.*

*My reading of the Land Transport regulations is that 'all other parking offences' are things wardens 'may' enforce, ie, they don't have to.*

*This has renewed my interest in council's legal advice."*

(Ms Rankin was referring to newspaper articles to which she provided references.)

5. In an email of 22 March 2012 to this Office, Ms Rankin further advised that:

*"Council has embarked on a process of reviewing its Traffic and Parking Bylaw, and its proposal is currently out for public consultation.*

*I am concerned that this is a tacit acknowledgement that the current bylaw does not completely and specifically support the nature of at least some of the parking infringements that continue to be issued.*

*Of particular interest are the proposed changes to section 9.*

*Our interest in having access to the legal opinions sought in the original request is magnified by the bylaw review."*

## Investigation

6. On 22 April 2013, I wrote to the Council to notify it of Ms Rankin's complaint. I requested a copy of the information at issue and a report on the reasons for withholding it.
7. On 21 May 2013, I received from the Council a copy of the information at issue.
8. On 12 December 2013, I wrote to the Council to inform it of my provisional opinion, which only partially upheld the Council's decision.
9. On 11 February 2014, Council wrote to inform me of the actions it proposed to take in light of my provisional opinion.
10. On 25 March 2014, I wrote to Ms Rankin to inform her of my provisional opinion that her complaint was, in part, not upheld.
11. On 10 April 2014, Ms Rankin advised that the Manawatu Standard had no further comments to make on my provisional opinion.

## Analysis and findings

### Section 7(2)(g)

12. Section 7(2)(g) of the LGOIMA provides good reason for withholding official information if:
  - a. the withholding of that information is necessary to *“maintain legal professional privilege”*; and
  - b. this interest is not, in terms of section 7(1) of the LGOIMA, *“outweighed by other considerations which render it desirable, in the public interest, to make that information available”*.
13. Both of these elements must be satisfied before section 7(2)(g) provides a good reason for refusing a request.
14. The Council has provided me with copies of four legal opinions that it had obtained which, in part, provided advice to the Council on its ability to impose fines on people in terms of Ms Rankin’s letter of 27 August 2012 to the Council, that is –

*“For paying for the wrong bay number and thus failing to activate the [parking] machine correctly.”*
15. I can understand Ms Rankin’s wish to ascertain the nature of the legal advice provided to the Council and the reasons for that advice. It appears from information which she has provided that the Council’s ability to impose infringement fees in the circumstances which she has described has raised a certain amount of public interest. In an email of 20 June 2013 to this Office, Ms Rankin stated:

*“The Council recently reviewed an earlier relaxation of its enforcement, and there is public dismay that no changes have been made in motorists’ favour. My understanding is that the Council could have opted to recategorise the unpopular ‘failing to activate the meter correctly’ infringement so it would carry a lower \$12 fine, rather than the current \$40, but has chosen not to do so. This has never been publicly acknowledged as a legal possibility ...”*
16. Having read the opinions provided by the legal advisors to the Council, Cooper Rapley, I am satisfied that these opinions were, in part, provided by the Council’s legal advisors for the purpose of giving confidential advice on the issues raised by Ms Rankin. (The opinions also provided confidential legal advice on other matters.)
17. The principles relating to legal privilege are well settled. Glazebrook J, in delivering the judgment of the Court of Appeal in *Shannon v Shannon*<sup>1</sup> referred to the Privy Council’s

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<sup>1</sup> [2005] 3 NZLR 757.

advice in *B v Auckland District Law Society*<sup>2</sup>. With reference to that advice, she stated that:

*“[36] ... legal professional privilege is more than an ordinary rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests and is not for the benefit of any particular client but in the wider interests of all those who might otherwise be deterred from telling the whole truth to their solicitors.*

*[37] The Privy Council rejected any suggestion that there should be a balancing exercise when considering the admissibility of privileged material ... legal profession privilege is itself the product of a balancing exercise between public interests whereby, subject to the well-recognised crime or fraud exception, the public interest in the perfect administration of justice is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant evidence. ... The rationale is that a lawyer has to be able to give a client an absolute and unqualified assurance that whatever a client reveals in confidence will never be disclosed without the client's consent. Such an assurance is inconsistent with the existence of a balancing exercise.”*

18. A matter which I have to consider is whether the Council has waived any privilege to the advice which it received in the opinions. In *Shannon v Shannon*, with reference to its decision in *Ophthalmological Society of New Zealand Inc v Commerce Commission*,<sup>3</sup> the Court of Appeal stated that:

*“[55] ... The test is that set out by this Court in Ophthalmological Society ... and involves an assessment of whether a party's use of privileged material has destroyed confidentiality.”*

19. In assessing whether a party's use of privileged material has destroyed confidentiality, the appropriate test in the Court's view, was whether, on that party's part, there had been an “abuse” of privilege. In further reference to the *Ophthalmological Society* case, the Court of Appeal in *Shannon v Shannon* stated that:

*“[56] ... The Court recognised that the fairness factor can be important in cases where there has been partial disclosure of legal advice and the consideration is whether natural justice requires disclosure of the whole advice. What must be assessed objectively in all cases, however, is the consistency of the conduct with maintaining the privilege. That requires close analysis of the particular context, what the issue is in relation to the privilege, how the evidence relates to that issue, and the question of whether there is inconsistency that could lead to injustice if the privilege is upheld. The weight*

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<sup>2</sup> [2004] 1 NZLR 326

<sup>3</sup> [2003] 2 NZLR 145

*to be given to fairness will depend on the circumstances, including the character of the privilege said to have been waived.” (supra at p.770)*

20. On the basis of the information that has been provided to me, I do not consider that the Council has acted in a way which is inconsistent with the maintenance of its privilege to the legal opinions in question, nor has it abused its right to that privilege.

## Public interest

21. As I have stated, I accept that the contents of the legal opinions would be of interest to the complainant. That does not mean that, under section 7(1) of the LGOIMA, it is *“desirable, in the public interest, to make that information available.”*

22. In the Ombudsmen's Practice Guidelines, it is stated that:

*“Legal professional privilege has long been regarded as 'a fundamental element in the administration of justice'. As such, the public interest in ensuring the maintenance of the privilege is very high. Given the strength of the public interest in ensuring the maintenance of legal professional privilege, any public interest consideration, in terms of section 9(1), which might outweigh the interest which section 9(2)(h) is designed to protect would need to be particularly strong.” (Part B, Chapter 4.8, p.4)*

(Section 9(1) and 9(2)(h) of the OIA are expressed in the same terms as section 7(1) and 7(2)(g) of the LGOIMA.)

23. The advice which the Council has received from its solicitors Cooper Rapley is plain and unequivocal in regard to members of the public, in error, paying for the wrong parking metre bay. For example, in their memorandum of 17 February 2012 to the Council, Cooper Rapley stated:

*“13. We believe in such situations Council should be prepared to exercise its discretion to waive the notice where evidence of a mistake in this regard is produced.”*

24. In a letter of 3 May 2012 to the Council, with reference to a particular proposed prosecution, Cooper Rapley advised the Council –

*“... it [was] highly likely that the Court would discharge the person even if the Court found that person had breached the parking Bylaw. You are then faced with the administrative and legal costs of a prosecution with no fine.”*

25. Accordingly, Cooper Rapley advised the Council not to commence a prosecution.

26. It is in the public interest that the Council should act, and be seen to be acting, in an even handed manner concerning enforcement of infringement fees where members of the public can satisfy the Council they have paid a parking fee of an appropriate amount, but they have paid it for the wrong bay. In terms of section 7(1), it is in the public interest that members of the public should be apprised of the legal advice which the Council has

received concerning this issue. It is not appropriate that the Council should keep members of the public in the dark about its legal advice on that matter and the possibility of their obtaining a waiver of such an infringement fee on production of satisfactory evidence. In so far as it is possible, the ability of members of the public to apply for a waiver should not be left to chance: their happening to know that they can do so.

27. In my opinion, in terms of section 7(1), the public interest in knowing the circumstances in which the Council will consider waiving the infringement fee overrides the necessity to maintain legal professional privilege to the legal opinions in question.
28. To satisfy the public interest under section 7(1) the Council should advise not only the complainant, but also members of the public, that on production of satisfactory evidence it will consider waiving infringement notices issued to those members of the public who contend that they have paid a parking fee for the wrong bay.

## Chief Ombudsman's opinion

29. For the reasons set out above, I have formed the opinion that section 7(2)(g) of the LGOIMA applied to the information which Ms Rankin requested, namely, a copy of the legal opinions provided to the Council. However, the countervailing public interest required disclosure of:
  - a. a brief summary providing the conclusions of the Council's legal opinions; and
  - b. a public statement that, on production of satisfactory evidence, Council will consider waiving infringement fees imposed on people who had paid for the wrong parking meter bay.
30. The Council accepted this opinion and provided copies of a proposed summary and public statement. The statement is to be published in the Manawatu Standard and on the Council's website for a period of two years. I have reviewed the summary and public statement and am satisfied that they address the identified public interest considerations. In view of this, it is not necessary for me to make any recommendations in this case.

Dame Beverley Wakem DNZM, CBE  
Chief Ombudsman

## Appendix 1. Relevant statutory provisions

### Local Government Official Information and Meetings Act 1987

#### 7 Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) ...
  - (g) maintain legal professional privilege; or...